

of these requirements to BOC manufacturing activities. The Commission has indicated that issues relating to implementation of Section 272(b)(2)'s requirement that the separate affiliate maintain separate books, records, and accounts will be addressed, along with other accounting safeguards issues, in a separate proceeding (i.e., CC Docket No. 96-150).<sup>39</sup> TIA will convey its position with respect to this facet of the Section 272 safeguards in separate comments to be filed in that proceeding.

**A. Uniform v. Customized Requirements [NPRM Section IV; Paragraph 56]**

As a threshold matter, the Commission has requested comment on whether the 1996 Act permits and whether it should "interpret or apply any of the section 272(b) requirements differently" with respect to BOC provision of interLATA services, which are regulated under Title II, as opposed to nonregulated manufacturing and information services.<sup>40</sup> The NPRM also seeks comment on how different requirements could be imposed on the three types of activities, where all three activities are conducted through one affiliate, as Section 272(a)(1) appears to allow.<sup>41</sup>

In general, TIA believes that Section 272(b) requirements should be construed and applied consistently to all

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<sup>39</sup> NPRM, Paragraph 61, n.120.

<sup>40</sup> NPRM, Paragraph 56.

<sup>41</sup> Id.

activities covered by Section 272 -- interLATA service, interLATA information service, and manufacturing. Section 272(b) establishes the basic criteria for a BOC separate affiliate. Structural separation is essential to ensure proper cost allocation and avoid cross-subsidization, a major goal of section 272. To the extent that a single affiliate is employed for manufacturing and other activities subject to the Section 272 structural separation requirements, establishment of a consistent and common set of rules under Section 272(b) would appear generally appropriate, and in some respects unavoidable.

As the Commission's NPRM observes, "[a] BOC's potential incentive and ability to favor its affiliate and to improperly allocate costs may vary . . . depending on the activity involved."<sup>42</sup> TIA comments focus on the need for implementation of Section 272(b) in a manner that effectively addresses competitive concerns arising in the context of manufacturing. To the extent that a different construction or application of a particular provision may be required or advocated, in order to accommodate concerns specific to the provision of interLATA telecommunications or information services, TIA's primary concern would be to ensure that the approach adopted by the Commission does not undermine or diminish the effectiveness of the Section 272 requirements in preventing cross-subsidization or discrimination in favor of BOC-affiliated manufacturers.

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<sup>42</sup> Id.

**B. Independent Operation [NPRM Section IV.A.; Paragraphs 57-60]**

Section 272(b)(1) provides that the separate affiliate shall "operate independently" from its affiliated BOC. As the Commission's notice recognizes, "[u]nder principles of statutory construction, a statute should be interpreted to give meaning to each of its provisions."<sup>43</sup> Accordingly, the Commission tentatively concludes that the "operate independently" requirement should be interpreted as "imposing requirements beyond those listed in subsections 272(b)(2)-(5)."<sup>44</sup> The Notice seeks comment on this tentative conclusion and on "what requirements the Commission should adopt to implement the statutory requirement that affiliates operate independently."<sup>45</sup>

TIA concurs in the Commission's tentative conclusion that the "independent operation" provision in Section 272(b)(1) has a meaning that extends beyond the specific requirements of Section 272(b)(2)-(5). To the extent that paragraphs (2)-(5) do not explicitly identify all actions necessary to ensure that the separate affiliate "operates independently" from the BOC, this section effectively directs the Commission to impose whatever additional requirements may be needed to ensure such

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<sup>43</sup> NPRM, Paragraph 57, n.107, citing Sutherland Stat. Const., § 46.05 (4th ed. 1984).

<sup>44</sup> NPRM, Paragraph 57.

<sup>45</sup> Id.

independence.<sup>46</sup> For example, Section 272(b) does not specifically require "separate facilities" but, clearly, separate facilities are necessary to ensure operational independence and to prevent cross-subsidization of BOC competitive activities.<sup>47</sup> Similarly, Section 272(b) does not make specific reference to the need for separate marketing, administrative capabilities, or research and development resources. Nonetheless, TIA believes that in order to ensure operational independence, and the protection of competition and ratepayer interests, consistent with the purposes of Section 272, BOC separate affiliates that engage in manufacturing should be required to conduct activities in each of these areas on an independent basis, separate and apart from their affiliated BOCs.<sup>48</sup> Moreover, as the discussion

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<sup>46</sup> In addition to the mandate imposed by Section 272(b)(1), the Commission is clearly authorized to impose additional requirements, addressing specific aspects of the separate affiliate's conduct of manufacturing activities in order to prevent cross-subsidy and discrimination, under Section 273(g) of the Communications Act, as amended. 47 U.S.C. § 273(g).

<sup>47</sup> As the Commission's Notice observes, the provisions of the House bill, which in contrast to the Senate bill included the "operate independently" language ultimately incorporated in the Telecommunications Act of 1996, prohibited the "joint ownership" of property by a BOC and its separate affiliate, and barred the shared use of any property other than telecommunications transmission or switching facilities. See NPRM, Paragraph 57, n.106.

<sup>48</sup> While the discussion above reflects the areas of primary concern to TIA, it is not exhaustive of all areas which may require the Commission's attention, in implementing the requirements of Section 272(b)(1).

of Section 272(b)(3) below indicates,<sup>49</sup> TIA believes that the requirements of Section 272(b)(1) should be construed to prohibit the shared or common use of "outside consultants" by a BOC and its separate affiliate as a means to evade the "separate employee" requirement and thereby subsidize the affiliate's competitive activities.

In its Notice, the Commission seeks comment on whether the "independent operation" requirement should be interpreted as imposing separation requirements of the sort adopted in the Commission's Computer II or Competitive Carrier proceedings.<sup>50</sup> TIA believes that while certain elements of the Computer II structural separations regime may provide useful points of reference, neither Computer II nor Competitive Carrier ever purported to address the specific cross-subsidy and discrimination issues associated with BOC entry into the manufacturing business.

The Competitive Carrier decision cited in the Commission's Notice dealt with the establishment of rules establishing the terms on which **independent LECs** could secure **"non-dominant" status** for their interstate, **interexchange** activities, and is therefore clearly inappropriate as a model for the establishment of separation requirements applicable to **BOC manufacturing** affiliates. Indeed, the order cited by the

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<sup>49</sup> See Section IV.C., infra.

<sup>50</sup> NPRM, Paragraph 59.

Commission concedes that the subject rules provide only incomplete protection against cost-shifting and other anticompetitive conduct, and acknowledges that the affiliate qualifying for "non-dominant" treatment is "not necessarily structurally separated from an exchange telephone company in the sense ordered by the Second Computer Inquiry."<sup>51</sup>

While certain of the Computer II structural separation requirements (e.g., separate books and records, separate officers) are reflected in the separation requirements of Section 272(b), the focus of Computer II was on the establishment of rules to govern the **provision of CPE and enhanced services** by AT&T and, subsequently, the divested Bell Operating Companies.<sup>52</sup> Accordingly, while some elements of Computer II may serve as points of reference for the current discussion, TIA does not believe that this line of cases provides an appropriate model for the development of comprehensive rules to govern the relationship

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<sup>51</sup> Competitive Carrier Fifth Report and Order, 98 FCC 2d 1191, 1198 (1984).

<sup>52</sup> In this regard, it should be noted that in successfully seeking relaxation of various Computer II rules following their divestiture from AT&T, the BOCs repeatedly cited the fact that they were precluded from manufacturing as a basis for relief, noting that the existence of MFJ line of business restrictions operated to substantially reduce opportunities for cross-subsidization and other anticompetitive conduct. See e.g., Report and Order, In the Matter of Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services By the Bell Operating Companies, 95 FCC 2d 1117, 1131 (1983).

between a BOC and a separate affiliate engaged in the manufacture of telecommunications equipment and/or CPE.

Finally, in its Notice, the Commission notes that Section 274(b) requires that a BOC separate affiliate or electronic publishing joint venture must be "operated independently," and goes on to prescribe certain specific activities that the electronic publishing affiliate can and cannot perform, including prohibitions on BOC "hiring or training of personnel on behalf of a separated affiliate" or "perform[ing] research and development on behalf of a separated affiliate."<sup>53</sup> The Notice goes on to request comment on the relevance of the "independent operation" requirement in Section 274(b) to the construction of Section 272(b)(1).<sup>54</sup> In TIA's view, the inclusion of these requirements in Section 274(b) provides useful guidance, in identifying several areas which TIA believes must be addressed by the Commission, along with the other areas of concern identified above (e.g., separate facilities, marketing, etc.), in adopting rules construing and implementing Section 272(b)(1).<sup>55</sup>

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<sup>53</sup> NPRM, Paragraph 60.

<sup>54</sup> Id.

<sup>55</sup> For example, as the Commission's notice indicates, Computer II allowed sharing of the costs for certain administrative services, such as legal services. See NPRM, Paragraph 62, n. 122, citing Computer II Reconsideration Order, 84 FCC 2d 50, 84 ¶ 102 (1980). This approach was based on the assumption that accounting systems could accurately allocate administrative costs. TIA does not believe that this assumption is accurate. Administrative costs are extremely difficult to allocate between different

C. Separate Officers, Directors, Employees [NPRM Section IV.C.; Paragraph 62]

Section 272(b)(3) provides that the separate affiliate "shall have separate officers, directors, and employees from the [BOC] of which it is an affiliate."<sup>56</sup> In discussing implementation of this provision, the Notice observes that in Computer II, the Commission required the separate subsidiary to have its own operating, marketing, installation, and maintenance personnel, while allowing the sharing of certain "administrative services" (e.g. accounting, legal, personnel, insurance, pension).<sup>57</sup> The Commission tentatively concludes that Section 272(b)(3) "prohibits the sharing of in-house functions such as operating, installation, and maintenance personnel, including the sharing of administrative services permitted under Computer II if those services are performed in-house."<sup>58</sup> The Notice also requests comment on whether the BOC and its affiliate should be barred from sharing the same outside services, such as insurance or pension services, and on "what other types of personnel sharing may be prohibited by section 272(b)(3)."<sup>59</sup>

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functions. Thus, TIA would argue that all costs should be separately incurred, including administrative costs (see discussion in Section IV.C. below), R&D, marketing and sales, etc.

<sup>56</sup> 47 U.S.C. § 272(b)(3).

<sup>57</sup> NPRM, Paragraph 62 [cites omitted].

<sup>58</sup> Id.

<sup>59</sup> Id.



TIA agrees with the Commission's tentative conclusion that Section 272(b)(3) prohibits the sharing of all "in-house" functions, including those authorized under Computer II.<sup>60</sup> TIA further believes that this requirement, together with the "independent operation" provision of Section 272(b)(1), requires the use of separate "outside" services as well. The separate affiliate must be required to stand on its own and not rely on its affiliated BOC to undertake any service or to subsidize activities undertaken by outside consultants on the affiliate's behalf. This is the only effective way to ensure that Section 272(b) fulfills its intended purpose of protecting competition and consumers from the adverse effects of BOC cross-subsidization.

**D. Credit Arrangements [NPRM Section IV.D.; Paragraph 63]**

Section 272(b)(4) states that the BOC affiliate "may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]."<sup>61</sup> The Commission's Notice tentatively concludes that "a BOC may not co-sign a contract, or any other instrument with a

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<sup>60</sup> In addition, the Commission must take steps to ensure that the requirements of Section 272(b) are not evaded, e.g., through transfers to the separate affiliate of operating company personnel whose experience and expertise may have been acquired at the expense of BOC ratepayers.

<sup>61</sup> 47 U.S.C. § 272(b)(4).

separate affiliate that would allow the affiliate to obtain credit in a manner that violates Section 272(b)(4)."<sup>62</sup>

TIA agrees with the Commission's tentative conclusion that a BOC may not co-sign a contract to enable the separate affiliate to obtain credit. TIA further believes that Section 272(b)(4), particularly when considered in conjunction with the "independent operation" requirement of Section 272(b)(1), prohibits any and all arrangements or activities which would result in the BOC in having any responsibility, directly or indirectly, for the financial obligations of the separate affiliate. In this regard, TIA notes in particular that the ability of a BOC affiliated vendor to rely on ultimate recourse to the BOC's credit would enable it to obtain more advantageous financing and to offer more advantageous financing to its customers, and would thereby give it an unreasonable and unfair advantage over non-affiliated vendors.

In addition to barring the BOCs from co-signing a contract to extend credit to its separate affiliate, the Commission's implementing regulations also should cover all other activities and arrangements which have such an effect, e.g., any reference to the BOC in debentures, reference to the BOC in any

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<sup>62</sup> NPRM, Paragraph 63. The Commission seeks comment on this conclusion and on "what other types of activities are prohibited by this provision." The NPRM also invites comment on whether the Commission should establish "specific requirements, regarding the types of activities that are contemplated by arrangements that are consistent with [Section 272(b)(4)]." Id.

equity instruments, use of the same underwriting facilities, or other arrangements in which the responsibility for cost, debt, equity, or business risk could be shifted to the BOC away from the separate affiliate.

**E. "Arms Length" Requirement [NPRM Section IV.E.; Paragraph 64]**

Section 272(b)(5) provides that the separate affiliate must "conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."<sup>63</sup> As the discussion above indicates, the Commission will address accounting issues associated with its implementation of Section 272(b)(5) in a separate rulemaking (i.e., CC Docket No. 96-150). However, the Commission seeks comment in this proceeding on whether implementation of the "arm's length" requirement necessitates any non-accounting safeguards.<sup>64</sup>

TIA believes that the arm's length requirement requires the establishment of procedures, consistent with generally accepted accounting principles, to ensure that all transactions between the BOC and its separate affiliate are indeed auditable. Unless such procedures are adopted, the biannual audit requirement under Section 272(d) would be rather meaningless.<sup>65</sup>

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<sup>63</sup> 47 U.S.C. § 272(b)(5).

<sup>64</sup> NPRM, Paragraph 64.

<sup>65</sup> TIA will address the implementation of accounting safeguards in greater detail in its comments in CC Docket No. 96-150.

In response to the Commission's request for comments on the need for **non-accounting** safeguards, TIA believes that the "arm's length" requirement of Section 272(b)(5) operates to reinforce the "independent operation" requirements of Section 272(b)(1). In this regard, activities that indicate a less than "arm's length" relationship between a BOC and its separate affiliate (e.g., movement of personnel back and forth between the BOC and its affiliate, joint promotional activities, joint marketing) also would reflect a failure to "operate independently," as required pursuant to Section 272(b)(1).

The requirement that transactions between the BOC and its affiliate occur only on an "arm's length" basis also reinforces the non-discrimination requirements established in Section 272(c). Implicit in the notion of an "arm's length" transaction is the principle that the BOC's separate affiliate should be dealt with in the same manner as any other entity seeking to engage in similar transactions with the BOC. While TIA does not propose that any specific non-accounting requirements be imposed solely to implement the requirements of Section 272(b)(5), TIA believes that this provision lends added support for the adoption of strong, comprehensive rules implementing these other provisions of Section 272, as described herein.

**V. NONDISCRIMINATION SAFEGUARDS [NPRM Section V; Paragraphs 65-81]**

As the Notice recognizes, once a BOC separate affiliate enters a competitive market such as manufacturing, the BOC will be subject to economic incentives that may lead it to use its control of essential local exchange facilities and dominant position in local service markets to "favor its competitive affiliate or to take actions that could weaken the affiliate's rivals."<sup>66</sup> In addition to the potential for discrimination in BOC procurement, specific concerns cited in the Notice with respect to manufacturing include the possibility that a BOC could "share information with its manufacturing affiliate or set standards that enable its manufacturing affiliate to produce equipment at a lower cost or with superior compatibility with the BOC's network as compared to that of competing manufacturers."<sup>67</sup>

The Section 272 non-discrimination provision of primary interest to manufacturers is Section 272(c)(1), which provides that, in its dealings with its separate affiliate, a BOC "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities and information, or in the establishment of standards."<sup>68</sup> Other nondiscrimination requirements discussed in

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<sup>66</sup> NPRM, Paragraph 65.

<sup>67</sup> Id.

<sup>68</sup> 47 U.S.C. § 272(c)(1). Concerns with regard to potential discrimination by a BOC in favor of its separate affiliate

the Notice, contained in Section 272(e), focus on preventing discrimination by a BOC in the provision of local exchange and exchange access facilities and services. These provisions are of primary interest to interLATA service providers. However, to the extent that a BOC separate affiliate may seek to market its equipment, together with resold BOC services, in competition with unaffiliated equipment vendors, the provisions of Section 272(e)(1)<sup>69</sup> address the potential for discrimination in the BOC's provision of service to the affiliate and its competitors.

**A. Section 272(c)(1) [NPRM Section V.A.-C.; Paragraphs 67-79]**

**1. Definitional Issues [NPRM Section V.A.-C.; Paragraphs 67, 76]**

In its Notice, the Commission invites comment on the need for definition of several of the terms used in Section 272(c)(1), including the terms "goods," "services," "facilities," and "information." In this regard, the Commission's Notice specifically inquires as to "whether further defining these terms . . . would enable competing providers to detect violations of this section by enabling them to compare more accurately a BOC's treatment of its affiliates with a BOC's treatment of unaffiliated competing providers."<sup>70</sup> Elsewhere in

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in the area of manufacturing also are addressed in Sections 273(c)-(e). See 47 U.S.C. § 273(c)-(e).

<sup>69</sup> 47 U.S.C. § 272(e)(1).

<sup>70</sup> NPRM, Paragraph 67.

its Notice, the Commission observes that while certain of the terms used in Section 272(c)(1) have been defined in the context of the Computer III proceedings, the Computer III rules do not specifically address the term "goods."<sup>71</sup> Accordingly, the Notice specifically seeks comment on "what regulations, if any, would be necessary to define that term."<sup>72</sup>

As the discussion above indicates, TIA's primary concern in this proceeding is to ensure that the Section 272 non-discrimination provisions are implemented in a manner that effectively addresses the potential for BOC discrimination in areas that affect competition in the equipment marketplace, e.g., procurement, information disclosure, network design, standard-setting, and provisioning. Rather than proposing comprehensive definitions of the terms used in Section 272(c)(1) for use in all contexts, TIA's comments focus on the need for a construction of these terms that is sufficiently detailed and expansive to make this provision effective in addressing the areas of specific concern to manufacturers.

In this regard, TIA believes that the terms "goods" and "services" should at a minimum be construed to encompass all types of telecommunications equipment, customer premises equipment, and related equipment, software, and services. Adoption of definitions that include all products and services

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<sup>71</sup> NPRM, Paragraph 76.

<sup>72</sup> Id.

whose design and intended use relates to the provision or use of telecommunications facilities or services will help to ensure that Section 272(c)(1) is applied in a manner that addresses the potential for discrimination against competing vendors in the areas identified above.<sup>73</sup>

As the discussion in Section V.A.5. below indicates, TIA believes that each BOC should be required to establish with specificity the procedures it intends to follow in order to ensure that it does not discriminate in the procurement of equipment and related services. In order to ensure that the non-discrimination requirements of Section 272(c)(1) are effectively enforced in the area of procurement in particular, TIA would further urge the Commission to consider adoption of an appropriate classification scheme which identifies discrete categories of products and related services procured by the BOCs. Establishment of such a scheme would greatly facilitate the monitoring of BOC compliance in this area.<sup>74</sup>

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<sup>73</sup> For similar reasons, TIA urges the Commission to broadly define the term "information," so that it encompasses any and all BOC transfers of information that may be useful to manufacturers attempting to design and market equipment for use in or connection to BOC networks. See discussion at Section V.A.6., infra.

<sup>74</sup> The TIA Buyer's Guide included in the annual TIA Directory and Desk Reference identifies various categories of products and services which could serve at least as a point of reference in the development of an appropriate classification scheme.



**2. Application to BOC Affiliates [NPRM Section V.B.;  
Paragraphs 70, 79]**

In discussing the scope of application of the Section 272 provisions, the NPRM notes that "[t]he nondiscrimination provisions of Section 272(c)(1) do not apply to the conduct of BOC affiliates," and that as a result "a BOC might have the incentive and ability to transfer network capabilities of its local exchange company to the operations of its competitive affiliates to avoid the nondiscriminatory provision of these capabilities as required by Sections 272(c)(1) and (e)."<sup>75</sup> In response to this concern, the Commission tentatively concludes that "any transfer by a BOC of existing network capabilities of its local exchange entity to its affiliates is prohibited by Section 272(a)," which requires any BOC affiliate that is a local exchange carrier subject to Section 251(c) to be separate from the Section 272(a) affiliate(s).<sup>76</sup> The Notice seeks comment on this conclusion, as well as whether, in the alternative, a transfer of BOC network capabilities to a competitive affiliate would make that affiliate a "successor or assign" of the BOC, thus subjecting the affiliate to the nondiscrimination requirements of Section 272.<sup>77</sup>

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<sup>75</sup> NPRM, Paragraph 70.

<sup>76</sup> Id.

<sup>77</sup> Elsewhere in its Notice, the Commission again notes that the language of Section 272(c) "might appear to allow a BOC affiliate that provides local exchange services to avoid compliance" with this section. However, the Commission

While the focus of discussion in the Notice is a concern that the BOC might seek to avoid its obligations to provide network facilities and services on a non-discriminatory basis, if network capabilities were transferred from the BOC to an affiliate not subject to Section 272(c)(1), associated procurement and standard-setting activities arguably might be removed from the nondiscrimination requirements of this section as well. Accordingly, TIA is concerned that the potential problem identified in the notice with respect to the transfer of local exchange facilities by a BOC also could undermine the pro-competitive purposes of Section 272(c)(1) in the area of manufacturing. TIA agrees with the Commission's tentative conclusion that Section 272(a) bars a BOC from transferring its local exchange operations to another affiliate as a means to avoid the non-discrimination requirements of Section 272. Alternatively, TIA believes that any attempt by a BOC to transfer its local exchange facilities to a separate entity would make such an entity a "successor or assign" and thus subject to the requirements of Section 272(c)(1).

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tentatively concludes that "Congress did not intend for a BOC to be able to move its incumbent local exchange operations to an affiliate in order to avoid complying with Section 272(c)." NPRM, Paragraph 79.

**3. Nondiscrimination Standard [NPRM Section V.C.;  
Paragraphs 72-73]**

In its Notice, the Commission correctly observes that Section 272(c)(1) provides that a BOC "may not discriminate,"<sup>78</sup> in contrast to Section 202 of the Communications Act, which bars only "unjust or unreasonable" discrimination. In light of this difference in language, the Commission seeks comment on "whether Congress intended to impose a stricter standard for compliance with Section 272(c)(1) by enacting this flat prohibition on discrimination."<sup>79</sup> TIA believes that Congress did intend to establish a stricter standard for nondiscrimination under Section 272(c)(1) than the standard provided for in Section 202 of the Communications Act. The absence of the modifier "unjust or unreasonable" with respect to the word discrimination in Section 272(c) clearly establishes a higher standard than that provided in Section 202 where the modifier appears. The plain meaning of the statute is therefore clear.<sup>80</sup>

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<sup>78</sup> 47 U.S.C. § 272(c)(1).

<sup>79</sup> NPRM, Paragraph 72.

<sup>80</sup> See First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, FCC 96-325, (released August 8, 1996) at ¶¶ 217, 859, in which the Commission has concluded that use of the term "non-discriminatory" in the 1996 Act establishes a more stringent standard than the "unjust and unreasonable" discrimination standard embodied in Section 202(a).

Applying the language of the statute, the Commission tentatively concludes that the prohibition "means, at a minimum, that BOCs must treat all other entities in the same manner as they treat their affiliates, and must provide and procure goods, services, facilities and information to and from these other entities under the same terms, conditions, and rates."<sup>81</sup> The Notice seeks comment on this tentative conclusion, as well as on "what regulations, if any, are necessary to implement this provision."<sup>82</sup>

TIA agrees with the Commission's conclusion that the BOCs must provide and procure goods, services, facilities, and information to or from other entities on the same terms and conditions that it employs in dealing with its manufacturing affiliate. As the discussion of procurement in Section V.A.5. below indicates, TIA believes that each BOC should be required to submit for Commission approval the procedures it intends to use to satisfy the nondiscrimination requirement of Section 272(c)(1). These procedures should be nondiscriminatory and the standards for procurement decisions should be developed and applied in a nondiscriminatory manner. Once approved, these procedures should apply to all BOC procurement activities, whether or not the supplier is affiliated, that involve the

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<sup>81</sup> NPRM, Paragraph 73.

<sup>82</sup> Id.

purchase of "goods" or "services," defined in a manner consistent with the discussion at Section V.A.1. above.

**4. Information Disclosure [NPRM Section V.C.; Paragraphs 74-75]**

In its Notice, the Commission observes that as a BOC enters competitive markets, it "could disclose information to its affiliates before disclosing this information to unaffiliated carriers, providers, or manufacturers."<sup>83</sup> The Notice goes on to cite the network information disclosure rules developed in the Computer II and Computer III proceedings, and invites comment on whether any of these safeguards are sufficient to implement the requirements of Section 272(c)(1).<sup>84</sup>

In considering the adequacy of the existing safeguards cited by the Commission, it is important to note what types of information these rules do and do not include. The current rules require the disclosure of information that "would affect either intercarrier connection or the manner in which customer premises equipment is attached to the interstate network."<sup>85</sup> They **do not** mandate disclosure of the type of information need to manufacture and market equipment (e.g., central office or transmission equipment) for use in the BOCs' networks. Clearly, such information must be included within the requirements of

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<sup>83</sup> NPRM, Paragraph 74.

<sup>84</sup> NPRM, Paragraph 75.

<sup>85</sup> See 47 C.F.R. § 64.702(d)(2).

Section 272(c)(1), in order for this section to achieve its intended purpose of preventing discrimination by a BOC in favor of an affiliated manufacturer.

The existing network disclosure rules are also inadequate in that they do not guarantee equal treatment, as required pursuant to the express terms of Section 272(c)(1), in the release of information to BOC affiliates and non-affiliates.<sup>86</sup> To remedy this deficiency, in a manner consistent with the language of the statute, the BOCs must be required to provide **all** manufacturers with access to information relating to the manufacture or sale of equipment for use in or connection to the BOC network, in a non-discriminatory manner, i.e., at the same time and on the same terms and conditions.<sup>87</sup>

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<sup>86</sup> As the Commission is no doubt aware, to the extent that the obligation to disclose information is triggered at the "make/buy" point, a BOC could provide an affiliate with a significant "head start" in the design and development of products that are designed to implement or take in to account entirely new capabilities or planned changes in the BOC network.

<sup>87</sup> While more expansive in its scope, such a rule would be analogous to the rule adopted by the Commission in the 1987 order cited in the Notice, which required BOCs that certified that they were not engaged in CPE research, development, or design to make "market information and technical network information relating to any new or modified network service that would affect the interconnection of CPE" available "at the same time and on the same terms and conditions" to all competitors, if such information was disclosed to any entity engaged in CPE design and development. See NPRM, Paragraph 75, n.145, citing Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, CC Docket No. 86-79, Report and Order, 2 FCC Rcd 143, 149-151, ¶¶ 44-54 (1987).

**5. Procurement Activities [NPRM Section V.C.; Paragraphs 76-77]**

In its Notice, the Commission observes that Section 273(c)(1) "prohibits, for example, a BOC from purchasing network equipment solely from its affiliate, purchasing the equipment from the affiliate at inflated prices, or giving any preference to the affiliate's equipment in the procurement process and thereby excluding rivals from the market in the BOC's service area and undermining competition."<sup>88</sup> The Commission seeks comment on "how the BOCs could establish nondiscriminatory procurement procedures designed to ensure that other entities are treated on the same terms and conditions as a BOC affiliate in the procurement of goods, services, facilities, and information," and on "the nature and extent of rules necessary to ensure that such procedures are implemented."<sup>89</sup>

TIA believes that a BOC should be required to establish with specificity the procedures it intends to follow in order to ensure that it does not discriminate in its procurement of "goods" and "services" defined in a manner consistent with the recommendations made by TIA in Section V.A.1. above.<sup>90</sup> These

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<sup>88</sup> NPRM, Paragraph 77.

<sup>89</sup> Id.

<sup>90</sup> The procurement compliance plans submitted by the Regional Bell Operating Companies, pursuant to Section II.C. of the MFJ, could serve as a starting point for the development of procedures to implement the requirements of Section 272(c)(1), as well as the procurement-related provisions of Section 273(e).

procedures should include specific standards that would be used in making procurement decisions.<sup>91</sup> Once the procedures are filed with the Commission by the BOCs, they should be reviewed by the Commission and approved or disapproved. In the course of conducting its review, the Commission should solicit the views of independent vendors. This approach is flexible in that the BOC establishes the procurement procedures (not the FCC), while providing the Commission with information needed to ensure that BOC procurement is conducted in a non-discriminatory manner, consistent with the requirements of Section 272(c)(1). Should a BOC decide to change its procedures, such changes must be reported to the FCC and reviewed. If the proposed changes are material in nature, they would also be subject to public comment and approval by the Commission.

**6. Standard-Setting Activities [NPRM Section V.C.; Paragraph 78]**

As the Notice indicates, "a BOC could act anticompetitively by creating standards that require or favor equipment designs which are proprietary to its affiliate."<sup>92</sup> The Commission seeks comment on what regulations, if any, are

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<sup>91</sup> For example, a BOC might provide for the use of procedures which provide for decisions to be made on the basis of an objective analysis of price, quality, delivery, and technical capability. These procedures might also incorporate the use of competitive bidding. If applied in good faith, such an approach in all probability would be compliant with the requirements of Section 272(c)(1).

<sup>92</sup> NPRM, Paragraph 78.



necessary to implement Section 272(c)(1)'s prohibition on BOC discrimination in the establishment of standards. More specifically, the Notice seeks comment on what "standards" are encompassed by this provision and on what procedures, if any, should be implemented to ensure that a BOC does not discriminate between its affiliate and other entities in setting standards.<sup>93</sup>

In this regard, the Commission asks whether BOCs should be "required to participate in standard-setting bodies in the development of standards covered by this section."<sup>94</sup> TIA believes that the BOCs should be strongly encouraged, if not required, to participate in the standards-development activities of accredited standard-setting groups, in establishing standards which affect the manufacture of equipment designed for use in or connection to the BOCs' networks. At a minimum, in developing technical standards for the operation of their networks and the interconnection of products and services thereto, as well as the generic specifications for products that they seek to procure, the BOCs should be required to establish and follow procedures that are open, transparent and non-discriminatory.<sup>95</sup> While a

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<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> In this regard, procedures similar to those followed by organizations accredited by the American National Standards Institute ("ANSI") would be appropriate. ANSI has the responsibility for ensuring that all standards development organizations which are accredited by ANSI use open, nondiscriminatory procedures that are fair to all industry participants. ANSI does not establish standards. Rather, it ensures that the procedures used in developing standards